APPENDIX A.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8627) * *

INITIAL DECISION.

By William L. Pack, Hearing Examiner.

Thomas J. Whitehead, for the Commission.

Charles H. Rowan and Willis Hagen, Milwaukee, Wisconsin, for the Respondents.

Respondents are charged in the Commission's complaint with the use of lottery methods in the sale and distribution of their merchandise, in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, a hearing was held at which evidence both in support of and in opposition to the complaint was introduced. Proposed findings and conclusions have been submitted by counsel for the parties, oral argument before the hearing examiner having been waived. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence or the applicable law.

Respondent Bear Sales Co. is an Illinois corporation with its principal office and place of business at 203 North Wabash Avenue, Chicago, Illinois.

Respondent E. Robert Baer is an officer of the corporate respondent, and formulates, directs and controls its acts and practices. His address is the same as that of the corporation.

Respondents are engaged in the sale and distribution, through others, of numerous articles of merchandise to the public.

In the course and conduct of their business respondents are engaged in interstate commerce within the meaning of the Federal Trade Commission Act. Not only is their merchandise sold and shipped to purchasers residing in states of the United States other than Illinois, but respondents' advertising and sales literature, order forms, and the alleged lottery devices are also mailed from respondents' place of business to numerous members of the public located in states other than Illinois (CX 1A-B; Tr. 27-31; 35-40).

Respondents' method of selling and distributing their merchandise is to send to members of the public advertising and sales literature, order blanks, and a device commonly called a push card. One of these cards, which is typical of those used by respondents, involves the sale of an electric broiler-toaster. The card has forty-five partially perforated discs, each of which bears a masculine or feminine name. Under each disc is a number which determines the amount to be paid by persons punching the discs. For example, the person punching the disc which has under it the number twelve pays twelve cents. The numbers are effectively concealed until the disc has been punched or separated from the card.

The card also contains a master seal under which is concealed a name corresponding to one of the names on the discs. When all of the discs have been punched, the master seal is removed and the person who has punched the disc bearing the name corresponding to that under the master seal wins the broiler-toaster (CX 3E).

Thus the amount to be paid and whether persons "playing" the card receive the broiler-toaster or nothing for the

amounts paid are determined wholly by lot or chance. The broiler-toaster has a value greatly in excess of the amount paid by any of the persons playing the card.

The operator of the card (member of the public to whom respondents have sent the card) sells the chances on the card among his friends and acquaintances. After all of the chances have been sold and the money collected, the operator remits the total amount to respondents and respondents ship to the operator two of the broiler-toasters, one to be delivered by the operator to the person punching the lucky disc and the other to be retained by the operator as compensation for his services.

In the circular letter which respondents send to members of the public along with the push card, the sales method is set forth as follows:

> "Show the enclosed card to all your acquaintances. Explain to them that they can win a genuine Continental Broiler-Toaster, guaranteed for 1 year, for as little as 1¢ just by taking a punch on the card. You see, under each of the names is a number. No. 1 pays 1¢, No. 6 pays 6¢, No. 12 pays 12¢, No. 14 pays 14¢, and No. 19 pays 19¢. But regardless of how high the number goes *nobody pays a single penny more than 39¢.*
>
> "Then, when all the names are punched out you lift the big seal and the person with the name under the big seal—even if they paid only 1¢—wins a deluxe Broiler-Toaster. And you've got yours almost as a gift!
>
> "What's more. The persons who get the numbers 3, 13 and 17 pay nothing and even they can win the Broiler-Toaster, too." (CX 3A)

The sales method clearly involves and contemplates a lottery. Respondents thus supply to and place in the hands of members of the public lottery devices to be used in the sale and distribution of respondents' merchandise.

Respondents do not deny that their sales method involves

the use of a lottery. Their defense is that their "practices are not inconsistent with the standards of fair dealing of contemporary business practices and public behavioral norms and are therefore not in violation of Section 5 of the Federal Trade Commission Act." (Respondents' Answer to Complaint.)

In support of this defense respondents point out that during comparatively recent years a number of the states in the United States have enacted laws permitting Bingo games, raffles, pari-mutuel betting on horse races, etc.; that there is now a state-operated lottery in New Hampshire. Respondents also showed, through the testimony of an expert witness, a professor of marketing at the University of Wisconsin at Milwaukee, and through documentary exhibits introduced through the witness' testimony, that a number of the country's major and reputable business concerns employ games, contests, and various methods in which there is an element of chance, in advertising and marketing their products. Such methods, according to the witness, appeal to the public's curiosity, to its needs and desires for amusement, novelty; etc. (Tr. 54-110; RXs 1-15.)

In summary, respondents' position appears to be that whatever may have been the situation in the past, the use of lotteries and games of chance in the sale of merchandise is not now in contravention of public policy and therefore is not in violation of the Federal Trade Commission Act.

The contention must be rejected. Insofar as the state statutes are concerned, they merely provide exceptions to the general rule against gambling. As for the games, contests and other methods used by major business concerns, it is obvious that most of them do not constitute lotteries. If any of them are in fact lotteries, their use is insufficient to show a change in public policy.

Since the decision in *Federal Trade Commission* v.

Keppel, 291 U. S. 304 (1934) innumerable decisions have held that the sale of merchandise by lottery means is in contravention of public policy and an unfair practice within the meaning of the Federal Trade Commission Act. A very recent case, which would appear to be decisive of the issue here, is *Dandy Products, Inc.* v. *Federal Trade Commission*, 332 F. 2d 985 (1964). Referring to a contention made there which is very similar to, if not identical with, the contention made here, the United States Court of Appeals for the Seventh Circuit said:

> "Without agreeing that morals are relative, as petitioners argue, we have considered petitioners' arguments that there are many contests, involving prizes, used by major companies; that in some states gambling is permitted and in others punchboards are held not to be gambling equipment; that gambling is not immoral *per se*, and is involved in stock brokerage and other businesses; and that a gambling 'instinct' seems to be a weakness in human nature. All these arguments were addressed to the Commission below, and in one degree or another have been addressed to this court, without success, in *Wren Sales, Peerless* and *Modernistic Candies*. We are not persuaded that this merchandising practice is less an 'unfair method of competition' today than it was in the time of *Keppel*."

It it concluded that respondents' practice constitutes an unfair practice in commerce in violation of the Federal Trade Commission Act and is to the prejudice of the public. The present proceeding is in the public interest.

Order.

IT IS ORDERED that respondent Bear Sales Co., a corporation, and its officers, and respondent E. Robert Baer, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, push cards or any other device designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.
2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

WILLIAM L. PACK,
Hearing Examiner.

January 25, 1965.

APPENDIX B.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—8627) * *

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

FINAL ORDER.

Respondents and counsel in support of the complaint having filed cross appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision denying respondents' appeal and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

IT IS ORDERED that the following order be, and it hereby is, substituted for the order contained in the initial decision:

IT IS ORDERED that respondent Bear Sales Co., a corporation, and its officers, and respondent E. Robert Baer, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, push cards or any other device designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device.
2. Selling or otherwise dipsosing of any merchandise by means of a game of chance, gift enterprie, lottery scheme, chance, or gaming device.

IT IS FURTHER ORDERED that the initial decision of the hearing examiner, as modified, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

BY THE COMMISSION. Commissioner Elman dissents on the ground that there is no "established public policy of the United States" that requires the Commission to expend its limited resources on this kind of case.

JOSEPH W. SHEA,
Secretary.

Issued: July 8, 1965.

BEFORE FEDERAL TRADE COMMISSION.

(Caption—8627)

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

OPINION OF THE COMMISSION.

Respondents have been charged with selling merchandise, through others, by means of a lottery scheme, game of chance or gift enterprise. The hearing examiner found that the allegations of the complaint had been sustained by the evidence and entered an order to cease and desist. The matter is before the Commission on cross appeals.

Respondents contend that complaint counsel failed to prove that the practice of selling merchandise by chance is an unfair act or practice under Section 5 of the Federal Trade Commission Act and further contend that this practice is not contrary to the established public policy of the United States. Both of these arguments are rejected. Respondents failed to demonstrate that the public's concern with lotteries as evidence by the various state and federal laws dealing with lottery and related practices had changed significantly to enable the Commission to conclude that lotteries were no longer against public policy. Similar attempts to show a change in public policy have been rejected by the Commission and the Courts. *Dandy Products, Inc.* v. *Federal Trade Commission*, 332 F. 2d 985 (7th Cir. 1964), *Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456

(7th Cir. 1961), *Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (7th Cir. 1960) and *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958).

Counsel supporting the complaint appeals from the scope of the examiner's order, arguing that the order may not apply to the practice of selling merchandise by means of devices designed to appeal to the public gambling instinct but which are not technically lotteries, *i.e.*, do not include all three elements of consideration, chance and prize. We agree that this possibility exists. See *J. C. Martin Corporation* v. *Federal Trade Commission*, 242 F. 2d 530 (7th Cir. 1957) and *J. C. Martin Corporation, et al.*, Docket No. 8520 (1964), aff'd ..... F. 2d ..... (7th Cir. 1965). The complaint specifically alleges that the sale of merchandise in accordance with respondents' sales plans "also constitutes the sale of merchandise by means of a chance or gaming device" and the findings, of course, support this allegation. Consequently, the order will be modified to prohibit respondents from selling merchandise by means of a chance or gaming device or placing in the hands of others devices for this purpose.

Respondents' appeal is denied. The appeal of counsel supporting the complaint is granted. An appropriate order will be entered.

Commissioner Elman dissents on the ground that there is no "established public policy of the United States" that requires the Commission to expend its limited resources on this kind of case.

July 8, 1965.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Session, 1965 — April Session, 1966.

No. 15350

BEAR SALES COMPANY, a corporation and E. ROBERT BAER, individually and as an officer of said corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Review and Set Aside an Order of the Federal Trade Commission.

June 1, 1966.

Before HASTINGS, *Chief Judge*, and CASTLE and KILEY, *Circuit Judges.*

PER CURIAM. This matter is before the Court upon the petition of Bear Sales Company, a corporation, and E. Robert Baer, individually, to review an order issued by the Federal Trade Commission. The order requires the petitioners to cease and desist from selling or disposing of merchandise by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device, and from supplying to others devices designed to be so used.

The record establishes that petitioners are engaged in a typical "push card" merchandising operation such as that recently considered by this Court in *Dandy Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 332 F. 2d 985, and found to constitute an unfair method of competition which violated the Federal Trade Commission Act. In *Dandy Products* we rejected as unpersuasive the contention that *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423, 78 L. Ed. 814, should no longer be considered an authoritative precedent because of what was represented to be "a change in the 'moral' climate of the business community". We find equally unconvincing petitioners' attempt to now distinguish *Dandy Products* on the basis that the prize contests etc. there alluded to as furnishing the predicate for a change in the standards by which to measure the fairness of merchandising methods were not, as here, the subject matter of proof contained in the record.

We adhere to our reliance upon *Keppel* and we regard *Dandy Products* as dispositive of the refurbished and embellished contentions made by the petitioners.

The petition to set aside, revise or remand the order of the Commisison is denied; the order is affirmed, and will be enforced.

ORDER AFFIRMED.

APPENDIX D.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Thursday, June 30, 1966.

Before

Hon. John S. Hastings, Chief Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

BEAR SALES COMPANY, et al., etc., *Petitioners,*
No. 15350 *vs.*
FEDERAL TRADE COMMISSION, *Respondent.*

Petition for review of an order of the Federal Trade Commission.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the petitioners herein, be and the same is hereby, DENIED.

APPENDIX E.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

BEAR SALES COMPANY, a corporation, and E. Robert Baer, individually and as an officer of said corporation, *Petitioners,* *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition for review of an order of the Federal Trade Commission.

FINAL DECREE ENFORCING ORDER TO CEASE AND DESIST.

June 29, 1966.

The Federal Trade Commission, having issued an order to cease and desist on July 8, 1965, against Bear Sales Company, a corporation, and E. Robert Baer, individually and as an officer of said corporation, in a proceeding before it entitled "In the Matter of Bear Sales Company, a corporation, and E. Robert Baer, individually and as an officer of said corporation, Docket Number 8627," and a petition to set aside, revise or remand said order to cease and desist having been filed in this Court on September 8, 1965, and the transcript of the entire record in the proceeding which resulted in the said order to cease and desist having been certified and filed in this Court; and the matter having been heard by this Court on briefs and oral argument on May 18, 1966; and this Court having rendered its decision on

June 1, 1966; and having, on the same date, entered its order denying the said petition to set aside, revise or remand, and affirming the said order of the Federal Trade Commission:

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bear Sales Company and E. Robert Baer be, and they hereby are, commanded forthwith to obey said order of the Federal Trade Commission and to comply therewith.

/s/ LATHAM CASTLE,
United States Circuit Judge.

/s/ ROGER J. KILEY,
United States Circuit Judge.

A true copy:
Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

By H. K. MCCORMACH,
Deputy Clerk.
(Seal)